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MAR 19 2004

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

JOHN MELVIN ALEXANDER, et al.,)

Plaintiffs,)

vs.)

Case No. 03-C-133-E

THE STATE OF OKLAHOMA; THE CITY)
OF TULSA; THE CHIEF OF POLICE OF)
THE CITY OF TULSA (in his official)
capacity); THE CITY OF TULSA POLICE)
DEPARTMENT; and DOES 1 through 100,)
inclusive,)

Defendants.)

ORDER

Now before the Court is the Motion To Dismiss Second Amended Complaint on Behalf of Defendant "State of Oklahoma" (dkt #59), the Defendant "State of Oklahoma's" Supplemental Motion to Dismiss Second Amended Complaint (dkt #82), and the Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt #92).

Plaintiffs' claims arise out of the Tulsa Race Riot of 1921, a tragic moment in Oklahoma's history, and the worst civil disturbance since the Civil War. The Riot, costly in terms of lives and property, destroyed the African-American Community of

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Greenwood and affects relations among races in the City of Tulsa and the State of Oklahoma to this date.

Plaintiffs, survivors of the Riot of May 31, 1921 to June 1, 1921, and descendants of persons affected by the Riot, bring claims against the State of Oklahoma, the City of Tulsa, the Chief of Police, the Tulsa Police Department, and John Does 1 through 100 for damages they sustained in the Riot. Plaintiffs bring claims against the City of Tulsa, the Chief of Police, and the Tulsa Police Department for deprivation of life and liberty in violation of the Fourteenth Amendment of the United States Constitution (first cause of action), for deprivation of property in violation of the Fourteenth Amendment (second cause of action), and for deprivation of their right to equal protection under the law in violation of the Fourteenth Amendment (third cause of action). With respect to the deprivation of life and liberty claim, certain Plaintiffs allege they had relatives killed in the Riot, or that the Plaintiffs themselves were physically or emotionally injured during the Riot. With respect to the deprivation of property claim, certain Plaintiffs allege they had real and personal property burned, looted or otherwise destroyed in the Riot. With respect to the equal protection claim, all Plaintiffs claim they were denied their equal rights under the law because Defendants "routinely under-investigated, under-responded, undercharged, mishandled and failed to protect Plaintiffs from a series of criminal acts or prosecute those responsible for such acts."

Plaintiffs also bring a claim against all Defendants for violation of 42 U.S.C. §1981 (fourth cause of action). Here Plaintiffs claim they were intentionally discriminated against in an effort to deny African-Americans their equal rights under the law. Plaintiffs bring claims against the City of Tulsa, the Chief of Police, the Tulsa Police Department, and Does 1 through 100 for violation of 42 U.S.C. §1983 (fifth cause of action) and violation of 42 U.S.C. §1985 (sixth cause of action). In their §1983 claim, Plaintiffs allege they were deprived of their federal rights pursuant to Defendants' longstanding official policy, practice or custom of racial discrimination and their reckless or callous indifference to Plaintiffs' federally protected rights. In their §1985 claim, Plaintiffs allege a conspiracy to deprive them of equal protection under the law.

Plaintiffs also bring two common law claims: one for promissory estoppel (seventh cause of action) against the State of Oklahoma and the City of Tulsa, and one for negligence (eighth cause of action) against the State of Oklahoma, City of Tulsa, Chief of Police, and the Tulsa Police Department. In their promissory estoppel claim, Plaintiffs allege that the State of Oklahoma is estopped from asserting the statute of limitations because of its promises in 1999 that restitution or reparations would be made for damages incurred during the Riot, and that the City of Tulsa is estopped from asserting the statute of limitations because of promises made in 1921 and 1999 regarding restitution for damages. With respect to negligence, Plaintiffs allege that Defendants were negligent in deputizing and issuing ammunition during the Riot, in failing to adequately train and

supervise its deputies, and in failing to train and supervise the National Guardsmen and members of police who were called to duty during the Riot.

Defendants did not answer, but have filed motions to dismiss. The State argues that Plaintiffs' claims should be dismissed because they are barred by the statute of limitations, because claims for monetary damages are barred by the immunity of the eleventh amendment, and because the claim for negligence is barred by the doctrine of sovereign immunity. The City argues that Plaintiffs' claims are conclusively time barred, and that the "descendant" Plaintiffs do not have standing to sue.

On February 13, 2004, The Court heard arguments on the motions to dismiss. The Court allowed Plaintiffs to present three witnesses in support of their position: Dr. John Hope Franklin, Dr. Eric Caine, and Dr. Eric Litwack. The parties were given the opportunity to address the recent case of *In re African-American Slave Descendants Litigation*, 2004 WL 112646 (N.D. Ill). The Court also raised the question of whether this case should not be considered on the merits because it involves a political question. All parties were given an opportunity to submit additional briefing on this issue. Therefore, this Order will consider not only the motions to dismiss, but also the issue of whether this case involves a political question.

A. LEGAL STANDARD

In considering a motion to dismiss, the Court accepts the well-pled allegations in the complaint as true and construes them most favorably to the plaintiff. *Gonzales v. City of*

Castle Rock, 307 F.3d 1258, 1261 (10th Cir. 2002). A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only “if the plaintiff can prove no set of facts to support a claim for relief.” *Id.*

With respect to statute of limitation, if the dates given in the complaint make clear that the right sued upon has been extinguished, plaintiff has the burden of establishing a factual basis for tolling the statute. *Aldrich v. McCulloch Prop., Inc.*, 627 F.2d 1036, 1041, n. 4 (10th Cir. 1980). Statute of limitations questions, therefore may be appropriate to consider on a motion to dismiss. *Id.*

B. BACKGROUND FACTS

Plaintiffs’ allegations center around a riot that began on the evening of May 31, 1921, and lasted into the day of June 1, 1921, destroying the African-American community of Greenwood, located just to the north of downtown Tulsa. The bulk of Plaintiffs’ allegations, and the factual background for their Complaint, appear to be taken from Tulsa Race Riot, A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921, published on February 28, 2001 (“Commission Report”), and the scholarly papers attached to that Report.

On May 31, 1921, Dick Rowland, an African-American, was arrested for allegedly assaulting Sarah Page, a white elevator operator, in the elevator in the Drexel Building on the previous day.¹ A white mob gathered outside the courthouse, and, amid rumors of a lynching, a group of African-American men went to the courthouse to prevent the

¹ Scott Ellsworth, *The Tulsa Race Riot*, published with the Commission Report, 37, 57 (2001).

lynching. When assured that Dick Rowland was safe, the men returned to Greenwood.² Members of the white mob began to arm themselves.³ As rumors circulated, a group of armed African American men returned to the courthouse to protect Dick Rowland. When a white man attempted to take a gun from an African American veteran, a shot rang out.⁴ The race riot had begun.

The key facts underlying Plaintiffs' claims are best summarized in the Commission Report:

Black Tulsans had every reason to believe that Dick Rowland would be lynched after his arrest on charges later dismissed and highly suspect from the start.

They had cause to believe that his personal safety, like the defense of themselves and their community depended on them alone.

As hostile groups gathered and their confrontation worsened, municipal and county authorities failed to take actions to calm or contain the situation.

At the eruption of violence, civil officials selected many men, all of them white and some of them participants in that violence, and made those men their agents as deputies.

In that capacity, deputies did not stem the violence but added to it, often through overt acts themselves illegal.

Public officials provided firearms and ammunition to individuals, again all of them white.

² Id. at 61.

³ Id.

⁴ Id. at 63.

Units of the Oklahoma National Guard participated in the mass arrests of all or nearly all of Greenwood's residents, removed them to other parts of the city, and detained them in holding centers.

Entering the Greenwood district, people stole, damaged or destroyed personal property left behind in homes and businesses.

People, some of them agents of the government, also deliberately burned or otherwise destroyed homes credibly estimated to have numbered 1,256, along with virtually every other structure – including churches, schools, businesses, even a hospital and library – in the Greenwood district.

Despite duties to preserve order and to protect property, no government at any level offered adequate resistance, if any at all, to what amounted to the destruction of the neighborhood referred to commonly as "Little Africa" and politely as the "Negro quarter."

Although the exact total can never be determined, credible evidence makes it probable that many people, likely numbering between one and three hundred, were killed during the riot.

Not one of these criminal acts was then or ever has been prosecuted or punished by government at any level, municipal, county, state, or federal.

Even after the restoration of order, it was official policy to release a black detainee only upon the application of a white person, and then only if that white person agreed to accept responsibility for that detainee's subsequent behavior.

As private citizens, many whites in Tulsa and neighboring communities did extend invaluable assistance to the riot's victims, and the relief efforts of the American Red Cross in particular provided a model of human behavior at its best.

Although city and county government bore much of the cost for Red Cross relief, neither contributed substantially to Greenwood's rebuilding; in fact, municipal authorities acted initially to impede rebuilding.

In the end, the restoration of Greenwood after its systematic destruction was left to the victims of that destruction.

Commission Report, 11-14.

Once the Tulsa Race Riot Commission completed its Report, the legislature of the State of Oklahoma adopted many of its findings. The findings of the Oklahoma Legislature shed light on the causes of the Riot and the damage created by the Riot. The Legislature found:

1. The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma;

2. Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31 - June 1, 1921, it is understandable that African-Americans believe they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that

some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence that took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area;

3. The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately \$2 million in 1921 dollars or \$16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive;

4. Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be swept well beneath history's carpet" for a community which attempted to attract new businesses and settlers;

5. The work of many individual Oklahomans and now of The 1921 Race Riot Commission has forever ended the "conspiracy of silence" surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will

respond to the historical record to the 48th Oklahoma Legislature;
and

6. The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and have been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the State of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

Okla.Stat.tit. 74, §8000.1. In the absence of the desired response by the 48th Oklahoma Legislature, Plaintiffs brought this suit.

C. PRELIMINARY ISSUES

Four preliminary motions must be considered before the motions to dismiss. First, the City filed a Motion to Exclude the Report and Testimony of Dr. Eric D. Caine (dkt #93), arguing that Dr. Caine's testimony is not relevant to the issues before the court does not meet the reliability requirements of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The City argues that Dr. Caine's testimony is not sufficiently tied to the facts of the case to aid the fact finder in resolving any factual dispute, as is required by *Daubert*. At the hearing on the motions to dismiss, the Court allowed Dr. Caine to testify,

reserving the question of whether his testimony would meet the requirements of *Daubert*. Dr. Caine, a psychiatrist, testified that survivors of the Riot were "walking on eggshells afterwards, because they were afraid the same rampage, the same killing and arson and brute force coercion that occurred before could occur again." He also testified that "few would have had the psychological resources to vigorously pursue restitution in court." Dr. Caine also admitted that he spoke to only six plaintiffs in this case.

While the Court is concerned about whether Dr. Caine's testimony meets the requirements of *Daubert*, the issue is moot because his testimony is not relevant to any factual issue in the case. As will be discussed in greater detail later, there is plenty of evidence, other than the testimony of Dr. Caine, to support the premise that African-Americans would have, and did have, an extremely difficult time pursuing their legal rights in the aftermath of the Riot. The difficult question centers around the legal significance of that difficulty. Dr. Caine does not and cannot address that issue.

In addition Defendants have sought leave to file replies in support of their motions to dismiss. The Court finds that the replies would be helpful and the motions should be granted.

An additional preliminary issue is raised with the City's Motion to Strike Plaintiffs' Supplemental Memo of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt #123). Here, the City objects to Plaintiffs' Supplemental Memo of Law filed after the hearing on the

motions, arguing that Plaintiffs address an issue in addition to the issue directed by the Court. In the course of this case, the Court has liberally allowed supplemental briefs in order to be fully informed on the complex and important issues before it. The additional briefing by Plaintiffs on the issue of whether the publication of Dr. Scott Ellsworth's book, Death in a Promised Land, in 1982 marked the point at which Plaintiffs' were on notice of their claims is also helpful to the Court. There is no reason to strike the supplemental brief.

D. JUSTICIABILITY

1. Political Question

The State, but not the City, contends this case should not be considered on its merits because it involves a political question. The political question doctrine provides that a federal court, which otherwise has jurisdiction over a dispute, should decline to adjudicate the dispute on the grounds that the case raises questions which should be addressed by the representative branch of our government. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962). In *Baker*, the United States Supreme Court set forth six factors for determining whether a case involved a political question requiring it to be dismissed as non-justiciable:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially-discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect for

coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

Relying on *In re African-American Slave Descendants Litigation*, _____ F. Supp. _____, 2004 WL 112646 (N.D. Ill.), the state argues that this case should be dismissed because there is a textually demonstrable commitment of the issue of reparations to Tulsa race riot survivors to the Oklahoma Legislature. Plaintiffs argues that none of the six factors apply in this case, that the political question doctrine does not apply to federal – state relations, and that the analysis in *In re African- American Slave Descendants Litigation* also does not apply here.

The Court agrees that the political question doctrine does not apply to federal-state relations, which are at issue here. “[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” *Elrod v. Burns*, 427 U.S. 347, 351 (1976). “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166. The State does not point to any authority where the political question doctrine was applied to an issue arguably reserved to the state

legislature.

The state also argues that the reasoning of the Court in *In Re African-American Slave Descendants Litigation* is applicable here. The analysis in that case was that since Congress has addressed the injuries of slavery in a comprehensive manner, the Court should not address these issues. It is important to note that no federal law addresses the Tulsa Race Riot or provides any compensation to its victims. Moreover, the Oklahoma legislature has not rejected the notion that judicially ordered relief for legal wrongs could or would be appropriate. The Court concludes that the political question doctrine does not apply in this case.

2. Standing

The City argues that the descendant Plaintiffs do not have standing to sue. Relying principally on *In Re African-American Slave Descendants Litigation*, the City argues that a genealogical relationship between a descendant and someone who actually suffered harm is insufficient to confer standing

To have standing, (1) plaintiffs must have suffered an injury in fact, (2) there must be a causal connection between the injury and conduct complained of, and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At the motion to dismiss state, general factual allegations of injury resulting from defendant's conduct suffice. *Id.* at 561.

The Court finds that Plaintiffs, including descendant Plaintiffs, have made the

general factual allegations of injury resulting from defendant's conduct sufficient to meet the requirements of *Lujan v. Defenders of Wildlife*. Moreover, *In Re African-American Slave Descendants Litigation* is factually distinguishable. The descendant Plaintiffs in this case do not claim derivative injury resulting from a wrong done to a population in general. Rather they are alleging specific injury as a result of being the descendant of a specific victim of the Race Riot, and they are claiming a direct link to the damages caused by the Riot. The Court finds that these allegations are sufficient to withstand a motion to dismiss on grounds of standing.

E. STATUTE OF LIMITATIONS

Defendants argue that Plaintiffs' claims are barred by the applicable statute of limitations. Defendants assert that, pursuant to Okla. Stat. tit. 12, §95, the statute of limitations for a civil rights action in Oklahoma is two years, and that since Plaintiffs' injuries occurred on May 31 and June 1, 1921, their claims are time-barred. Plaintiffs do not disagree with the statute of limitations that Defendants seek to apply, but argue that equitable tolling, equitable estoppel, or promissory estoppel either toll the statute of limitations or operate to prevent the statute of limitations from barring their claims. In addition, Defendants argue that the statute of limitations does not run on lawsuits seeking to vindicate public interest.

It is undisputed that a two year statute of limitation applies to civil rights claims in Oklahoma. It is also clear that while state law governs limitations and tolling issues,

federal law governs the accrual of claims. *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995). Statutes of limitations are “designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers v. Ry Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). However, “exceptions” to statutes of limitations exist in equitable doctrines such as equitable estoppel, equitable tolling and waiver.

Plaintiffs argue that Defendants are equitably estopped from invoking the statute of limitations because the City concealed its participation in the riot and because the City made binding promises to provide restitution to the victims of the riot. These issues of law focus on the wrongful conduct of Defendants.

Plaintiffs also argue that equitable tolling prevents the operation of the statute of limitations in this case. Equitable tolling focuses on the conduct and diligence of Plaintiffs. Plaintiffs argue that the statute of limitations should be equitably tolled in this case because extraordinary circumstances following the Riot prevented them from asserting their rights, and, until the Commission Report, they were unable to obtain information necessary to bring their claim.

1. City's Concealment and Plaintiffs' Knowledge

A defendant is “estopped from interposing the defense of a time bar” if he has made “any false, fraudulent or misleading conduct or some affirmative act of concealment to

exclude suspicion and preclude inquiry.” *Jarvis v. City of Stillwater*, 732 P.2d 470 (Okla. 1987). A party that conceals “the fact that a cause of action has accrued against him” is estopped from raising the statute of limitations defense. *Morris v. Wise*, 293 P. 2d 547, 549 (Okla. 1956). Plaintiffs argue that the City concealed its role in the Riot through the convening of a Grand Jury that blamed the Riot on the victims, the failure to investigate the riot or prosecute persons who committed murder or arson, and the disappearance of official files from the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department. Plaintiffs further support this argument with the language from Okla.Stat.tit.74, § 8000.1.4. referring to a “conspiracy of silence” that “served the dominant interests of the state.”

In addition to arguing that the City concealed its role in the Riot, invoking the doctrine of equitable estoppel, Plaintiffs argue that their claims did not accrue until they knew of the City’s involvement. A civil rights action does not accrue under federal law until the facts that support a cause of action are or should be apparent. *Fratus*, 49 F.3d at 675.

Equitable tolling also applies, even if there is no concealment, if “despite all due diligence [plaintiff] is unable to obtain vital information bearing on the existence of his claim.” *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). The concept of equitable tolling was applied to allow descendants of Jewish customers of French financial institutions to sue those institutions for alleged participation in a scheme to appropriate

assets of customers during Nazi occupation in *Bodner v. Banque Paribas*, 114 F.Supp.2d 117 (E.D. N.Y. 2000). Suit was brought in 1997 for spoliation of assets occurring in the 1940's. The Court found that tolling was appropriate where "plaintiffs can show that it would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim." *Id.* at 135. In the present case, Plaintiffs argue that they could not have known of the City's involvement until the Commission had completed its report.

Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the City's involvement any sooner. While it is certain that the Commission Report has helped to gather more facts about the Riot, the Court has considerable trouble with the Plaintiffs' assertion that until the Commission issued its report, they were unaware of the City's responsibility for their injury.

The allegations in the Complaint do not support this assertion. In their Complaint, Plaintiffs assert that the City refused to pay any restitution to African-American survivors of the riot. Second Amended Complaint (SAC), 22. They further assert that "Legal redress was also stymied by Oklahoma common law doctrine, which unconstitutionally limited municipal liability. Precedent applied from Oklahoma's Territorial Court made it difficult, if not impossible, for Riot victims to sustain a claim against the City of Tulsa or its actors absent ratification by the City Council." SAC, 23. These allegations demonstrate

that some Riot victims did attempt to hold the City responsible, realizing the City's role before the publication of the Commission Report.

Other allegations in the Complaint demonstrate the obvious, that victims of the Riot would have observed the City's actions during the Riot. Plaintiffs allege:

The white Police Chief John A Gustafson, deputized between 250 and 500 white men. The police issued guns to the newly deputized white citizens of Tulsa to put down what they referred to as a "Negro uprising," but failed to even record the names of the people to whom they gave the guns. After the Riot, Police Chief Gustafson pleaded in the pages of a white Tulsa newspaper for the return of guns, stating they were issued with the understanding that they would be returned when the need for them passed.

SAC, 168-69. There is also an allegation in the Complaint that "Binkley Wright saw many African Americans killed when the white mob, including newly deputized members of the police department and men in military uniform broke through and heavily attacked the church." SAC, 170. The Complaint is replete with allegations of misconduct by "deputies" and Guardsmen who would have had to have been observed by African American victims of the Riot.

In addition, comments in some of the papers attached to the Commission Report demonstrate the victims' awareness of the City's role in the Riot. It is clear that more than one hundred lawsuits were filed against the City, insurance companies, and even Sinclair Oil Company.⁵ In one paper, it is noted that "After the riot, a number of black

⁵ Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, published with the Commission Report, 153, 166 (2001).

Tulsans, strongly condemned, in no uncertain terms, the actions of both the Tulsa Police Department and the local National Guard units during the conflict.”⁶ The Court concludes, therefore, that the allegations in the Complaint do not support Plaintiffs’ assertion that they did not or could not have known of the City’s role in the Riot immediately after the riot.

2. The City’s Promises of Restitution

The Plaintiffs argue that Defendants are “estopped from interposing the defense of a time bar” where they have made “(a) some assurances of settlement negotiations reasonably calculated to lull the plaintiff into a sense of security and delay action beyond the statutory period or (b) an express and repeated admission of liability in conjunction with promises of payment, settlement, or performance.” *Jarvis v. City of Stillwater*, 732 P.2d 470, 472-73 (Okla. 1987). Plaintiffs allege that Tulsa promised that it would “make good the damage, so far as can be done, to the last penny.” SAC, 221. Plaintiffs’ reliance on such a promise, however, is not supported by the allegations of the Complaint:

In the aftermath of the Riot, the State of Oklahoma and the City of Tulsa impeded the Plaintiffs’ attempts to rebuild their lives. The City of Tulsa acted quickly to apply zoning restrictions to Greenwood that rendered reconstruction of the destroyed dwellings prohibitively expensive. When the zoning regulations were declared unlawful, Defendant the City of Tulsa refused to provide economic compensation or to help the victims, many of whom remained in tents through the fall and into the winter of 1921.

⁶ Scott Ellsworth, *The Tulsa Race Riot*, published with the Commission Report, 37, 86 (2001).

SAC, 21. The Court does not find that the City's promises of restitution are sufficient to give rise to equitable estoppel.

3. "Extraordinary Circumstances"

Equitable tolling is appropriate where extraordinary circumstances outside a person's control prevent him from timely asserting a claim. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). Intimidation and fear of reprisal are extraordinary circumstances that warrant equitable tolling. *Id.* The effective unavailability of the courts system also constitute the type of extraordinary circumstances that would toll the statute of limitations. *Id.* Another court has held that "the brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure" meant that "for the majority of Plaintiffs, the years following World War II were particularly difficult" and warranted equitable tolling of the statute of limitations. *Rosner v. United States*, 231 F.Supp.2d 1202, 1209 (S.D. Fl. 2002).

Plaintiffs assert extraordinary circumstances in a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow. There is no question that there are exceptional circumstances here. Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward.

The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights. The question is not a factual question of whether exceptional circumstances existed. They did. It is a legal question of the effect, with respect to the issue of statute of limitations, of those exceptional circumstances.

When extraordinary circumstances are found, the statute of limitations is tolled until those circumstances no longer exist. *Hilao*, 103 F.3d at 773 (exceptional circumstances created by president's human rights violations toll statute of limitations until that president is no longer in office). Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable case and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." *In re African-American Slave Descendants Litigation*, ____ F.Supp.2d ____, 2004 WL 112646, *41 (quoting 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedures § 1056, at 239 (3d ed. 2002)). In the instance of equitable tolling, the obligation is on the Plaintiff to use diligence in bringing suit when it becomes possible. The Court has already determined that Plaintiffs were aware of the necessary facts in the aftermath of the Riot. Other extraordinary circumstances were intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow. Plaintiffs' expert, Dr. Leon Litwack testified that the Jim Crow era

ended in the 1960's. Further, there is no credible allegation that any of the other exceptional circumstances continued until the Commission Report was published.

4. State's Promise to follow the Recommendations of the Commission

Plaintiffs also argue that the State is bound by its promise to follow the recommendations of the Commission. Promissory estoppel requires 1) a clear and unambiguous promise, 2) foreseeability by the promisor that the promisee would rely upon it, 3) reasonable reliance upon the promise to the promisee's detriment and 4) hardship or unfairness that can be avoided only by the promise's enforcement. *Russell v. Board of County Commissioners, Carter County*, 952 P.2d 492, 503. Here Plaintiffs appear to be relying on a 1999 statement by then-Governor Frank Keating and the Commission Report itself. Governor Keating said that "Compensation for direct loss occasioned by direct state or city action is not inappropriate But it has to be shown that there was real harm to existing, living individuals and that direct action by the city and the state caused the harm." SAC, 219. Such reliance is not reasonable. Only the legislature could authorize reparations. Moreover, nothing in the Commission Report is binding on the legislature, and there is no evidence that the Oklahoma Legislature has promised to pay restitution or reparations to the race riot survivors.

5. Vindication of Public Interest

Plaintiffs argue that lawsuits seeking to vindicate the public interest are not time-barred. *Town of Cyril v. Mobil Oil Corp.* 11 F.3d 996, 998 (10th Cir. 1993). Under *Town*

of *Cyril*, "a municipal corporation is entitled to avoid the bar of the statute of limitations if it sues in its "sovereign capacity" in an appropriate case." *Id.*

Plaintiffs assert that "[b]ecause the City and State have failed to act, Plaintiffs stand in their shoes to fulfill the recommendation of the Tulsa Race Riot Commission and to restore the honor and dignity of the entire community. . . ." Plaintiffs provide no authority for their proposition that, under the holding of *Town of Cyril*, a private Plaintiff would ever be allowed to "stand in the shoes" of a municipal corporation. Moreover, the Court does not agree with Plaintiffs' assertion that the City and State have failed to act. While Plaintiffs have not received any restitution or reparations, a Commission was established and legislative findings were made.

The Court concludes that Plaintiffs' claims are barred by the Statute of Limitations and that there is no exception or equitable doctrine which would prevent the operation of the Statute of Limitations in this case.

F. IMMUNITY

The State argues that Plaintiffs' claims against it are barred by the Eleventh Amendment. Plaintiffs' point out that, under the doctrine of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) declaratory and injunctive relief is permitted against a state officer sued in his or her official capacity. If the Court construes the Second Amended Complaint as stating a claim against the State instead of the Governor, the Plaintiffs request that they be permitted to amend the complaint to state claims for injunctive and

declaratory relief under 42 U.S.C . §§ 1981, 1983, and 1985 against Governor Brad Henry in his official capacity as Governor of the State of Oklahoma. Although amendment would be normally allowed at this relatively early stage of litigation, the Court finds that the request is moot, and amendment would be futile in light of its finding that Plaintiffs' claims are barred by the Statute of Limitations.

G. SANCTIONS

Shortly after the hearing on the pending motions, the City filed a Motion for Sanctions (dkt #124), essentially arguing that filing the Complaint was sanctionable conduct because it should have been apparent that Plaintiffs' claims were barred by the statute of limitations. The issue of the statute of limitations and the potential application of equitable doctrines of estoppel and tolling in this case is very complex and difficult. The Court noted at the end of the hearing:

I appreciate the presentations and well thought out arguments that have been presented today. It is not a simple question. It is not simplistic. There are serious issues of the statute of limitations and there are serious responses to those issues, and I understand that.

There is no valid argument that bringing these claims constitutes sanctionable conduct. In fact the filing of the motion for sanctions is more troubling than the filing of the Complaint. The contentious attitude of Defendants in this case has been destructive and wasteful of judicial resources. Plaintiffs brought serious claims against Defendants, and Defendants should have, and did, defend themselves vigorously against those claims. However, the contentious attitude that led to the filing of a motion for sanctions, in effect

belittles the decision to bring this lawsuit, and only fuels the belief that the State and City are ignoring their moral responsibility for the Riot. Such conduct is, indeed, unfortunate particularly in light of the findings of the Legislature based on the Commission Report

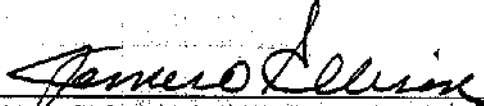
H. CONCLUSION

The Commission Report is a valuable tool in understanding and documenting the Race Riot of 1921. It also brings needed attention to an extremely tragic event in our City's and our State's history, and, hopefully, will be a tool for healing and uniting communities. Although Plaintiffs urge that it should also be the foundation for the application of equitable doctrines to prevent the barring of claims by the statute of limitations, the Court is unable to find any legal basis for using the Report in this way. There is no comfort or satisfaction in this result, and there should be none to Defendants. That Plaintiffs' claims are barred by the statute of limitations is strictly a legal conclusion, and does not speak to the tragedy of the Riot or the terrible devastation it caused.

The Motion To Dismiss Second Amended Complaint on Behalf of Defendant "State of Oklahoma" (dkt #59) is MOOT, the Defendant "State of Oklahoma's" Supplemental Motion to Dismiss Second Amended Complaint (dkt #82) is GRANTED, and the Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt #92) is GRANTED, The City's Motion to Exclude the Report and Testimony of Dr. Eric D. Caine (dkt #93) is GRANTED, the City's Application for Leave to File Reply to Plaintiffs Response to Defendant City's Motion to Dismiss and

Alternative Motion for Summary Judgment (dkt # 99) is GRANTED, the Defendant State of Oklahoma's Application for Leave to File Reply to Plaintiffs' Response to State of Oklahoma's Motion to Dismiss (dkt #108) is GRANTED, the City's Motion to Strike Plaintiffs' Supplemental Memo of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt #123) is DENIED, and the City's Motion for Sanctions (dkt #124) is DENIED.

IT IS SO ORDERED THIS 19TH DAY OF MARCH, 2004.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT